Supreme Court, U.S.
FILED

0215 15 APR 15 2003

OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

BALJIT S. AULAKH AND
PAVITAR AULAKH,

*Petitioners*

v.

CAPITOL INDEMNITY CORPORATION

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## PETITION FOR A WRIT OF CERTIORARI

DANIEL M. PRESS
*Counsel of Record*
RUSSELL B. ADAMS III
Chung & Press, P.C.
6723 Whittier Ave., Suite 302
McLean, Virginia 22101
(703) 734-3800

53pp

## QUESTION PRESENTED

1. Whether the Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 – 1691f applies to the issuance of surety bonds and entry into associated indemnity agreements.

## PARTIES TO THE PROCEEDINGS

Petitioners are Baljit S. Aulakh and Pavitar Aulakh. The Respondent is Capitol Indemnity Corporation. Superior Management Services, Inc., a corporation wholly owned by Petitioner Baljit S. Aulakh, was a party to the underlying litigation but did not appeal the decision of the district court.

## TABLE OF CONTENTS

Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1
A. Factual Background ..... 2
B. Proceedings Below ..... 3

REASONS FOR GRANTING THE PETITION ..... 4

I. THE FOURTH CIRCUIT INCORRECTLY HELD THAT THE EQUAL CREDIT OPPORTUNITY ACT DOES NOT APPLY TO SURETY BONDS ..... 4

CONCLUSION ..... 11

## TABLE OF AUTHORITIES

**Page**

*Cincinatti Ins. Co. v. Smigiel,* 1997 U.S. Dist. LEXIS 6694(E.D. Mich. Mar.20,1997) ..... 10
*Universal Bonding Ins. v. Esko & Young, Inc.,* 1991 WL 30049 (N.D.Ill. Feb.28, 1991) ..... 10
15 U.S.C. §§ 1691 – 1691f..... 1
15 U.S.C. §1691(a) ..... 4
15 U.S.C. §1691a(d) ..... 5,7
15 U.S.C. §1691a(e) ..... 4,7
28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1291..... 3
28 U.S.C. § 1332..... 3
40 U.S.C. §§ 270a –270f..... 6
12 C.F.R. § 202.7(d)(1)(2002) ..... 5
Pub. L. 93-495, § 502, reprinted at 15 U.S.C.A. §1691 Historical and Statutory Notes... 6

## PETITION FOR A WRIT OF CERTIORARI

Baljit S. Aulakh and Pavitar Aulakh respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 313 F.3d 200. App. 1, *infra*. The opinion of the district court was issued in open court and is unreported. App. 10, *infra*.

## JURISDICTION

The judgment of the court of appeals was entered on December 12, 2002. A timely petition for rehearing and rehearing *en banc* was denied on January 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The pertinent statutes are reproduced in the Appendix. The statutes involved are 15 U.S.C. §§ 1691 – 1691f . App. 16, *infra*.

## STATEMENT OF THE CASE

The issue of whether the issuance of a surety bond and entry into an associated indemnity agreement constitutes a credit transaction to bring it under the regulation of Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 – 1691f ("ECOA"), App. 16, *infra*, is an important question of federal law that has not been, but should, be settled by this

Court. The issue was one of first impression in the federal appellate courts that has a far-reaching impact on indemnity agreements commonly utilized in the surety bond industry.

**A. Factual Background**

The relevant facts in this case are few and undisputed. The only issue is a question of law as to whether ECOA applies to the issuance of performance or payment surety bonds and entry into associated indemnity agreements.

Superior Management Services, Inc. ("Superior") is a Maryland corporation in the construction contractor business. Baljit Aulakh ("Mr. Aulakh") is the president and sole shareholder of Superior. Pavitar Aulakh ("Mrs. Aulakh") is Baljit S. Aulakh's wife and has no relationship to Superior other than the fact that she is married to Mr. Aulakh. Capitol Indemnity Corporation ("Capitol") is an insurance company authorized to write surety bonds in the Commonwealth of Virginia.

On or about January 2, 1998, as a condition of issuance of surety bonds necessary for Superior's business, Capitol required Superior, as principal, and Mr. *and Mrs.* Aulakh, as indemnitors, to execute a General Indemnity Agreement agreeing to indemnify Capitol for any losses incurred, inter alia, by reason of having executed or procured the execution of any bond or bonds. Capitol subsequently issued performance and payment bonds as surety for Superior. Superior subsequently defaulted on its payments to various material suppliers and

subcontractors, which Capitol paid pursuant to its obligations under the payment bonds.

**B. Proceedings Below**

Respondent sued Petitioners and Superior in the United States district Court for the Eastern District of Virginia, Alexandria Division, to indemnify the Respondent, pursuant to the General Indemnity Agreement, for monies paid by Respondent under payment and performance surety bonds issued by Respondent on behalf of Superior. Respondent filed a Motion for Summary Judgment against Petitioners and Superior. Superior did not contest the Motion for Summary Judgment, but Petitioners opposed the Motion on the grounds that Respondent had violated the anti-discrimination provisions of the Federal and Virginia Equal Credit Opportunity Acts in that it unlawfully required Baljit S. Aulakh's wife, Pavitar Aulakh, to enter into the General Indemnity Agreement as a condition of issuing the surety bonds.

The District Court ruled in its Decision and Order dated January 18, 2002 that surety bonds were not credit as defined by ECOA and, therefore, not subject to the anti-discrimination provisions of ECOA. App. 10 and 12, *infra*. The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1332. The Petitioners filed a timely Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit on February 8, 2002.

The Fourth circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. Following oral argument on October 30, 2002, the Fourth Circuit

affirmed the District Court's decision in a published written opinion dated December 12, 2002. App. 1, *infra*. Petitioners filed a timely Petition for rehearing and Rehearing *en banc*, which was denied by the Fourth Circuit by Order dated January 15, 2003. App. 14, *infra*.

## REASONS FOR GRANTING THE PETITION

The ruling by the Fourth Circuit opens the door for sureties to continue with their common practice of requiring spouses of those applying for surety bonds to sign indemnity agreements despite the fact that the spouse has no interest in the business seeking the surety bond, other than the fact that he or she is married to the owner of the business. Such is the type of discrimination that the Federal Equal Credit Opportunity Act is intended to prohibit. The Fourth Circuit's decision is the only circuit court decision that addresses this important issue of federal law.

### I. THE FOURTH CIRCUIT INCORRECTLY HELD THAT THE EQUAL CREDIT OPPORTUNITY ACT DOES NOT APPLY TO SURETY BONDS

The Federal Equal Credit Opportunity Act makes it "unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction: (1) On the basis of ... marital status." 15 U.S.C. §1691(a), and defines a "creditor" to include "any person who regularly arranges for the extension, renewal, or continuation of credit," 15 U.S.C. §1691a(e), and "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment, or purchase

property and services and defer payment therefor" (emphasis added). 15 U.S.C. §1691a(d). The regulations implementing the ECOA provide that "... a creditor shall not require the signature of an applicant's spouse... on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1) (2002).

An examination of the true nature of a surety relationship and of performance and payment (surety) bonds reveals that a surety is a "creditor" and that the issuance of such instruments are, in fact, "credit transactions" and, therefore, subject to ECOA. A surety bond is a guarantee issued in exchange for a fee (premium) in which the "surety" guarantees that the contractor, or "principal" on the bond, will perform the "obligation" stated in the bond. The "obligation" in a performance bond is that the principal will complete the construction project and the "obligation" in a payment bond is that the principal will properly pay subcontractors and suppliers. If the principal fails to perform the obligation in the bond, both the principal and the surety are liable to the obligee (i.e. the owner of the project or the subcontractor or supplier) on the bond, jointly and severally.

In essence, the premium paid by the principal to the surety for the issuance of the bonds is simply a service fee to the surety for allowing its credit to be used. While it is true that, if the principal fails to carry out the obligation set forth in the bond, the surety must make good the loss to the obligee, the surety then has recourse to the principal, and any

indemnitors, for total reimbursement of the debt thereby incurred. In many respects, a Surety is similar to a banker making a loan as, in effect, both are lending their credit: for the benefit of the borrower in the case of a bank loan, and for the benefit of the contractor in the case of a surety bond.

Surety bonds are required in virtually all federal construction contracts performed in the United States, 40 U.S.C. §§ 270a–270f ("The Miller Act"). Performance and payment bonds are also often required by owners of most large private construction projects. The surety bond acts as a security deposit for the benefit of the obligee, with the surety lending its credit to the principal, without which the contractor would not be able to enter into federal, state or large private construction contracts. Without the backing of the borrowed credit of the surety, the contractor would be unable to enter into any such contracts and would, essentially, be out of business. The purpose and public policy goal of ECOA, as set forth in the Congressional Findings and Statement of Purpose, is "to insure that various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status." Pub. L. 93-495, § 502, reprinted at 15 U.S.C.A. §1691 Historical and Statutory Notes. Applying ECOA to the surety relationship is consistent with and furthers this policy.

In the context of ECOA, where a "creditor" is defined to include one who "arranges for the

extension... of credit," 15 U.S.C. §1691a(e) (emphasis added), and "credit" is defined to include "the right to incur debt and defer payment," 15 U.S.C. §1691a(d), a surety, through the issuance of a surety bond, "arranges" for subcontractors and suppliers to extend "credit" to the principal, and is, therefore, a "creditor" as defined by ECOA. Under a surety bond, the surety has obligated itself to pay the "obligations," or debts, of the principal contemplated by the bond if the principal fails to do so.

While the bonds do not necessarily extend the "right" to incur debt and defer payment beyond a subcontractor or supplier's payment terms, ECOA does not require that the debt be long-term. The bond gives the principal the right to incur debt to subcontractors and suppliers that is not C.O.D. or paid in advance - i.e., to defer payment, a right that the principal would not have without the surety bond. As such, the issuance of surety bonds, such as those issued by the Respondent, are "credit transactions" under ECOA. An indemnity agreement, such as the one in the case at bar, executed in conjunction with, and as a requirement for, the issuance of surety bonds is, therefore, an aspect of a "credit transaction" with respect to which it is unlawful to discriminate on the grounds of marital status.

In its decision, the Fourth Circuit overlooked this interplay between a "creditor" who arranges for the extension of credit, and the "credit" extended. An entity may be a "creditor" under ECOA in that the entity regularly "arranges" for the extension of credit, without necessarily extending credit itself. The

"credit", or "right to defer payment", may actually be extended by a third party creditor, from whom the initial creditor arranges such an extension. The Fourth Circuit overlooked this interplay in holding that, to constitute a credit transaction under ECOA, Capitol would be required to "grant a right to SMS to defer payment." App. 7, *infra*.

The credit that was "arranged" by Capitol in this case was not credit between Capitol and SMS but credit between the suppliers and subcontractors of SMS, which would not have been available without the surety bonds issued by Capitol. This type of third party "arrangement" of credit is analogous to the services performed by a mortgage broker. While a mortgage broker is clearly a creditor under ECOA as the function of a mortgage broker is to arrange for the extension of credit, the mortgage broker itself does not actually issue the credit that it arranges. The credit is issued by another creditor, the mortgage lender, to the applicant. This does not negate the fact that the mortgage broker is still a creditor under ECOA and subject to the anti-discrimination provisions of ECOA in the credit transaction involving the applicant, mortgage broker and mortgage lender.

In the case at bar, Capitol acts as a facilitator or "broker" of credit for SMS in that, without Capitol's surety bonds, SMS would be required to pay its suppliers C.O.D. The surety bonds permit SMS to defer payment to its suppliers, which arrangement would otherwise be unavailable without the guarantee of payment provided by the surety bond.

Moreover, the General Indemnity Agreement in

this case (as is true generally in the industry) provides for more than the basic surety relationship. Section 21 of the "General Indemnity Agreement" at issue in this case provides:

> **Liability for loans to Principal.** It is agreed that the surety may in its sole discretion loan or advance money to the Principal to be used in the furtherance of any contract referred to or guaranteed by any bond and each and all of the undersigned shall be liable and responsible to the Surety for all monies so loaned or advanced whether properly used by the Principal or not, and all costs, attorney's fees and expenses incurred by the Surety in relation thereto, unless repaid by the Principal with legal interest when due; and such monies, costs, fees and expenses shall be deemed to constitute a "loss" under the terms of this agreement and not a voluntary payment.

The Fourth Circuit, in deciding that surety bonds were not credit as defined by ECOA, overlooked this provision of the Indemnity Agreement, which is similar or identical to those in use throughout the surety industry. This provision, by which the indemnitors agree to guarantee any loans made by the surety to the principal make this a credit transaction, just as if a spouse were required to guarantee a credit card or other banking relationship that may or may not be utilized. The fact that such a provision was never used is of no consequence as the mere inclusion

of the provision subjects the indemnitors to potential liability for loans made by the surety to the principal – loans made with no further involvement or approval by the indemnitors.

Even if a bare surety relationship were not "credit", this provision guaranteeing loans makes it a credit transaction under the ECOA. This provision specifically contemplates a loan in the traditional sense, including the accrual of interest should payment be deferred. Such a loan provision brings the surety agreement squarely within the purview of ECOA.[1] The Fourth Circuit, in its decision, failed to address this issue raised in the briefs, and denied a Motion to Rehear based upon this issue.

The arbitrary requirement of Capitol that Pavitar Aulakh sign the indemnity agreement, despite the fact that she had no involvement in the business of Superior other than the fact that she is the wife of Baljit Aulakh, smacks of just the sort of unfairness and partiality that Congress sought to eradicate with the passage of the ECOA. It is just this type of discriminatory practice that policy behind the ECOA

---

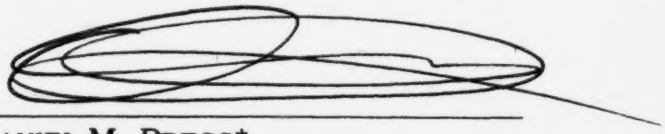
[1] Two district courts have addressed the issue of the applicability of the ECOA in relation to suretyship relationships in unpublished opinions and have ruled similarly to the Fourth Circuit. *See Cincinnati Ins. Co. v. Smigiel*, 1997 U.S. Dist. LEXIS 6694, at *6-*10 (E.D. Mich. Mar. 20, 1997) and *Universal Bonding Ins. v. Esko & Young, Inc.*, 1991 WL 30049, at *3 (N.D. Ill. Feb.28, 1991) (summary judgment granted in favor of the surety and against spouse of principal). However, neither of these cases discussed the issue in depth nor addressed the existence of a loan provision such as the one contained in the Agreement of Indemnity in this case.

was intended to remedy.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



DANIEL M. PRESS*
RUSSELL B. ADAMS III
*Chung & Press, P.C..*
*6723 Whittier Ave., Suite 302*
*McLean, Virginia 22101*
*(703) 734-3800*
*Counsel for the Petitioners*

**Counsel of Record*

April 15, 2003

**APPENDIX**

**App. Pg.**

Dec. 12, 2002 Fourth Circuit Opinion ..... 1

Jan. 11, 2002 Transcript of District Court Ruling.. 10

Jan. 18, 2002 Order of District Court ..... 12

Jan. 15, 2003 Order Denying Petition to Rehear.... 14

15 U.S.C. §§ 1691 – 1691f..... 16

**APPENDIX**

**App. Pg.**

Dec. 12, 2002 Fourth Circuit Opinion ..... 1

Jan. 11, 2002 Transcript of District Court Ruling.. 10

Jan. 18, 2002 Order of District Court ..... 12

Jan. 15, 2003 Order Denying Petition to Rehear.... 14

15 U.S.C. §§ 1691 – 1691f..... 16

App. 1

**December 12, 2002 Fourth Circuit Opinion**

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

---

CAPITOL INDEMNITY CORPORATION,
*Plaintiff-Appellee,*

v.

BALJIT S. AULAKH; PAVITAR P. AULAKH,
*Defendants-Appellants,*

No. 02-1160

and

SUPERIOR MANAGEMENT SERVICES, INCORPORATED,
*Defendant.*

---

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-01-1068-A)

Argued: October 30, 2002

Decided: December 12, 2002

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

---

Affirmed by published opinion. Judge Motz wrote the

opinion, in which Judge Widener and Judge Williams joined.

---

**COUNSEL**

**ARGUED:** Daniel Mark Press, CHUNG & PRESS, P.C., McLean, Virginia, for Appellants. Brian Paul Waagner, WICKWIRE GAVIN, P.C., Vienna, Virginia, for Appellee. **ON BRIEF:** Russell B. Adams, III, CHUNG & PRESS, P.C., McLean, Virginia, for Appellants. Edward G. Gallagher, WICKWIRE GAVIN, P.C., Vienna, Virginia, for Appellee.

---

**OPINION**

DIANA GRIBBON MOTZ, Circuit Judge:

The district court granted summary judgment to Capitol Indemnity Corporation on its claim that Baljit S. Aulakh and his wife, Pavitar Aulakh, breached an indemnity agreement they had entered into with Capitol Indemnity pursuant to a surety bond. The Aulakhs appeal, contending that the indemnification agreement cannot be enforced against one or both of them because Capitol required Pavitar Aulakh to sign the agreement in violation of the Equal Credit Opportunity Act and its Virginia counterpart. Because a surety bond does not constitute a credit transaction under these statutes, we affirm the district court's grant of summary judgment to Capitol.

I.

The parties do not dispute the following facts. Baljit Aulakh is the president and sole shareholder of Superior

Management Services, Incorporated ("SMS"), a Maryland corporation in the construction business. Pavitar Aulakh is Baljit Aulakh's wife.

Capitol Indemnity Corporation ("Capitol") is an insurance company authorized to write surety bonds in the Commonwealth of Virginia. By means of a surety bond, a surety (in this case, Capitol) agrees to protect the obligee if the principal (SMS) defaults in performing the principal's contractual obligations. The bond is the instrument that binds the surety. *See* Black's Law Dictionary 181 (6th ed. 1990).

On January 2, 1998, the Aulakhs executed an indemnity agreement with Capitol obligating them to indemnify the insurer for losses and expenses incurred by Capitol in providing surety bonds for SMS projects. Following the execution of the indemnity agreement, Capitol issued various performance and payment bonds as surety for SMS construction projects. SMS later defaulted on a series of contracts involving work at Bolling Air Force Base. In paying out on the applicable surety bonds, Capitol incurred $92,594 in losses and expenses.

Accordingly, Capitol filed this indemnity action seeking judgment against SMS, Baljit S. Aulakh, and Pavitar Aulakh, jointly and severally, for the amount of its losses, as well as attorney's fees and costs. SMS and the Aulakhs responded initially by questioning whether Capitol incurred its losses in good faith. After deposing Capitol's corporate designee, they conceded the point.

Capitol then moved for summary judgment. SMS admitted liability for the full amount of Capitol's claim. The Aulakhs, however, contended that the indemnity agreement was unenforceable as to one or both of them

because Pavitar Aulakh's signature had been secured in violation of the Federal Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. (1998) ("ECOA"), and its Virginia analogue, the Virginia Equal Credit Opportunity Act, Va. Code Ann. § 59.1-21.19 et seq. (2001) ("Virginia ECOA"). They argued that because Pavitar Aulakh had no involvement in the business of SMS, other than the fact that she was married to its sole shareholder, Capitol's requirement that she sign the indemnity agreement constituted credit discrimination under the equal credit opportunity statutes. The district court granted summary judgment to Capitol, ruling that neither the ECOA nor the Virginia ECOA applied to the transaction underlying Capitol's indemnity claim.

II.

This case presents an issue of first impression in the federal appellate courts: whether the ECOA and its state analogues apply to surety bonds.

By their terms, these statutes only govern credit transactions between statutorily-defined credit applicants and creditors. The animating principle of the ECOA and its state analogues is to prevent discrimination against those applying for credit. As such, they contain broad anti-discrimination provisions that "make it unlawful for any creditor to discriminate against any applicant with respect to any credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1); Va. Code Ann. § 59.1-21.21:1(a)(1).

In explicitly identifying "sex or marital status" as one of the prohibited bases for discrimination in credit transactions, legislatures sought to eradicate credit discrimination against women, particularly married

women with whom creditors traditionally had refused to deal. *See Markham v. Colonial Mortgage Service Co*, 605 F.2d 566, 569 (D.C. Cir. 1979) (stating that "one, perhaps even the main, purpose of the [ECOA] was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit"); *see also Riggs Nat'l Bank v. Linch*, 36 F.3d 370, 374 (4th Cir. 1994). Regulations implementing the ECOA offer explicit guidance in this respect. *See* 12 C.F.R. § 202.7(d)(1) (2002) ("Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse . . . on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."). Therefore, since Capitol has not offered any reason why requiring Ms. Aulakh to sign the indemnity agreement would not have violated the ECOA and the Virginia ECOA if those statutes governed the agreement, summary judgment to Capitol was only appropriate if the equal credit statutes did not apply here.

Resolution of this question turns on whether the surety bond arrangement between SMS and Capitol (and the issuance of surety bonds in general) qualifies as a "credit transaction" under the terms of the equal credit statutes, thus triggering the anti-discrimination provisions. Both statutes define "credit" as "the *right granted by a creditor to a debtor to defer payment* of debt or to incur debts and defer its payment or to purchase property and services and defer payment therefor." 15 U.S.C. § 1691a(d); Va. Code Ann. § 59.1-21.20(b) (emphasis added). The statutes define a "creditor," in relevant part, as "any person who regularly arranges for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691a(e); Va. Code Ann. § 59.1-21.20(c). Finally, a "credit transaction" is defined as "every aspect of an

applicant's dealings with a creditor regarding an application for credit or an existing extension of credit." 12 C.F.R. § 202.2(m) (2002).

These provisions read together make clear that the essence of the "credit" relationship under the equal credit statutes is one that provides a right to defer payment on a debt or other obligation. This conclusion finds ample support in the case law. *See, e.g., Riethman v. Berry*, 287 F.3d 274, 277 (3d Cir. 2002) ("The hallmark of `credit' under the ECOA is the right of one party to make deferred payment."); *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 18 (2d Cir. 1990) ("[I]t is apparent that the ECOA extends only to instances in which the right to defer payment of an obligation is granted. Absent a right to defer payment for a monetary debt, property or services, the ECOA is inapplicable.").

The Aulakhs argue that because the "surety, through the issuance of a surety bond, `arranges' for subcontractors and suppliers to extend `credit' to the principal," the surety falls within the ECOA's definition of creditor. Brief of Appellants at 10. Although they admit that "the bonds do not necessarily extend the `right' to incur debt and defer payment beyond a subcontractor or supplier's payment terms," they contend that "the bond gives the principal the right to incur debt to subcontractors and suppliers that is not C.O.D. or paid in advance, a right that the principal would not have without the surety bond." *Id.* Consequently, the Aulakhs claim, surety bonds effectively function as "credit transactions" under the ECOA. *Id.* According to this line of reasoning, indemnity agreements executed in conjunction with and as a requirement for the issuance of surety bonds thus qualify as aspects of "credit transactions" and are subject to the anti-discrimination provisions of ECOA.

The problem with this argument is that nothing in the surety bond transaction or the indemnity agreement entitles anyone to defer payment of any debt or other obligation, a *sine qua nom* of coverage under the equal credit statutes. As noted above, the ECOA and its Virginia counterpart define "credit" as "the right granted by a creditor to a debtor" to defer payment of a debt or other obligation. Construing the transactions at issue in this case as credit transactions under these statutes would thus require that Capitol grant a right to SMS to defer payment. While the surety bond may indeed have allowed SMS to negotiate different contractual obligations and payment terms with its suppliers and sub-contractors, it did not give SMS any sort of right to defer payment.

Instead, the surety bond simply provided that in the event that SMS defaulted on its contractual obligations, Capitol would take the place of SMS and satisfy those obligations. By virtue of the indemnity agreement, Capitol could then proceed against SMS and the Aulakhs for indemnification from the losses and expenses incurred as a result of paying out the surety bond. In effect, the surety bond together with the indemnity agreement worked to allocate the default risk associated with various contractual obligations incurred by SMS in the course of its construction business. This was not an instrument that allowed for any sort of deferral or restructuring of debt payments. The underlying cash flows attached to the specific contract would simply continue apace. Indeed, the surety bond worked to ensure that there was no interruption or deferral of these cash flows. It operated as an insurance instrument rather than a debt or credit instrument.

We hold, therefore, that the issuance of surety bonds

does not constitute a credit transaction as defined under the ECOA and the Virginia ECOA. Neither Congress nor the Virginia legislature exhibited any intent for parties to use these statutes to escape liability from valid contractual obligations; and we refuse to sanction such an effort here. SMS needed surety bonds in order to engage in construction projects at Bolling Air Force base. *See* 40 U.S.C. § 270(a) (2001) (the "Miller Act") (current version at 40 U.S.C. § 3131 (West, Westlaw current through P.L. 107-278, approved Nov. 5, 2002)). Capitol provided those surety bonds, thereby ensuring that the contractual obligations incurred by SMS in its construction projects would be met. In return, Capitol required that SMS and the Aulakhs sign an indemnity agreement, guaranteeing payment for losses and expenses incurred as a result of any default by SMS and subsequent pay out of the surety bonds by Capitol. Each side obtained exactly what it sought.

We note that this conclusion comports with theview of the two district courts that have addressed the issue. *See Cincinnati Ins. Co. v. Smigiel*, 1997 U.S. Dist. LEXIS 6694, at *6-*10 (E.D. Mich. Mar. 20, 1997) (rejecting a claim that ECOA applied to surety's indemnity claim); *Universal Bonding Ins. v. Esko & Young, Inc.*, 1991 WL 30049, at *3 (N.D. Ill. Feb. 28, 1991) (rejecting a claim that ECOA applied to suretyship promise on grounds that the contract extended no right to defer payment on debt or other obligation). Both of those cases involved a surety's claim for indemnification against corporate and individual indemnitors, including a husband and wife who had signed the indemnity agreement. In both cases, the wife sought to escape liability through alleged violations of the anti-discrimination provisions of the ECOA. And in both cases, the court granted summary judgment to the surety, holding that the ECOA does not apply to the execution of an indemnity agreement

executed in conjunction with a surety bond. *See also Connecticut Indem. Co. v. Ashworth*, 1997 Me. Super. LEXIS 60, at *6-8 (Me. Super. Feb. 21, 1997) (same result).

Our holding should not be read to suggest that the issuance of surety bonds can never operate as a "credit transaction" as defined in a different statute or as understood in a different set of circumstances. Rather, we simply conclude that under the definition of credit provided in the ECOA, specifically the right to defer payment on a debt, the issuance of surety bonds does not qualify as a credit transaction. Given the sophistication of modern capital markets, virtually all financial instruments have an inherent plasticity that allows them to operate in a variety of capacities. The linkages between insurance and debt markets, moreover, render suspect any attempt to develop a precise rule that separates such instruments into one category or another. The law forever plays catch-up with the capital markets. This creates all the more reason to adhere closely to statutory language in deciding individual disputes such as the one at hand.

III.

For the foregoing reasons, the judgment of the district court is

*Affirmed*

**January 11, 2002 Transcript of District Court Ruling**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

---

CAPITOL INDEMNITY CORPORATION
Plaintiff,

—vs— C.A. No. 01—1068—A

SUPERIOR MANAGEMENT SERVICES, INC., et al.,
Defendants.

---

HEARING ON MOTIONS

January 11, 2002

Before: Claude M. Hilton, Judge

APPEARANCES:

Russell B. Adams, III, Counsel for the Plaintiff [*sic*]
Brian P. Waagner, Counsel for the Defendant [*sic*]

* * *

THE COURT: . . . I find that this just doesn't apply. That the surety company simply doesn't extend the credit. And that this Act doesn't apply to the surety. Any court that has looked at that has held that.

And I believe that has got to be the case. They simply do

not extend the credit or make arrangements for extending the credit.

And I believe the defendant's motion is well-taken-- Or Capitol Credit, the plaintiff's motion is well-taken. And I will grant summary judgment in this case.

**Jan. 18, 2002 Order of District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FILED
JAN 18 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

---

CAPITOL INDEMNITY CORPORATION,
Plaintiff,

v. Civil Action 01-1068-A

SUPERIOR MANAGEMENT SERVICES,
et al.,
Defendant.

---

ORDER

This matter comes before the Court on Plaintiff's motion for summary judgment. For the reasons stated from the bench, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is GRANTED and judgment is entered against Defendants Superior Management Services, Inc., Baljit S. Aulakh and Pavitar P. Aulakh, jointly and severally, in the amount of $92,593.59, plus interest from the date of judgment and costs incurred in this action. It is further ORDERED that Plaintiff is entitled to indemnification from Defendants Superior Management Services, Inc., Baljit S. Aulakh and Pavitar P. Aulakh, jointly and

severally, for future losses and expenses, including attorney's fees, incurred by Capitol as surety for Defendant Superior Management Services, Inc. This indemnification includes, but is not limited to, losses and expenses incurred in connection with the bond claim asserted by Siemens Building Technologies, Inc., which claim is now pending before this Court as United States ex rel. Siemens Building Technologies, Inc. v. Superior Management Services, Inc., et al., No. 01-988-A.

/s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 18, 2002

**January 15, 2003 Order Denying Petition to Rehear**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 15, 2003

No. 02-1160
CA-01-1068-A

CAPITOL INDEMNITY CORPORATION
Plaintiff - Appellee

v.

BALJIT S. AULAKH; PAVITAR P. AULAKH
Defendants - Appellants

and

SUPERIOR MANAGEMENT SERVICES, INCORPORATED
Defendant

---

On Petition for Rehearing and Rehearing En Banc

---

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing

and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

# 15 U.S.C. §§ 1691 – 1691f

## Sec. 1691. - Scope of prohibition

**(a)** Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction -

**(1)** on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

**(2)** because all or part of the applicant's income derives from any public assistance program; or

**(3)** because the applicant has in good faith exercised any right under this chapter.

**(b)** Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor -

**(1)** to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

**(2)** to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

**(3)** to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

**(4)** to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

**(c)** Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to-

**(1)** any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

**(2)** any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

**(3)** any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

**(d)** Reason for adverse action; procedure applicable; "adverse action" defined

**(1)** Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

**(2)** Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by -

**(A)** providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

**(B)** giving written notification of adverse action which discloses

**(i)** the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and

**(ii)**the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

**(3)** A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

**(4)** Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

**(5)** The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not

act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

**(6)** For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

**(e)** Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal

**Sec. 1691a. - Definitions; rules of construction**

**(a)** The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

**(b)** The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly

by use of an existing credit plan for an amount exceeding a previously established credit limit.

**(c)** The term "Board" refers to the Board of Governors of the Federal Reserve System.

**(d)** The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

**(e)** The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

**(f)** The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

**(g)** Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question

**Sec. 1691b. - Promulgation of regulations by Board; establishment of Consumer Advisory Council by Board; duties, membership, etc., of Council**

**(a)** Regulations

> **(1)** The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and

exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

**(2)** Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Board determines, after making an express finding that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

**(3)** An exemption granted pursuant to paragraph (2) shall be for no longer than five years and shall be extended only if the Board makes a subsequent determination, in the manner described by such paragraph, that such exemption remains appropriate.

**(4)** Pursuant to Board regulations, entities making business or commercial loans shall maintain such records or other data relating to such loans as may be necessary to evidence compliance with this subsection or enforce any action pursuant to the authority of this chapter. In no event shall such records or data be maintained for a period of less than one year. The Board shall promulgate regulations to implement this paragraph in the manner prescribed by chapter 5 of title 5.

**(5)** The Board shall provide in regulations that an applicant for a business or commercial loan shall be provided a written notice of such applicant's

right to receive a written statement of the reasons for the denial of such loan.

**(b)** Consumer Advisory Council

The Board shall establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under this chapter and to advise and consult with it concerning other consumer related matters it may place before the Council. In appointing the members of the Council, the Board shall seek to achieve a fair representation of the interests of creditors and consumers. The Council shall meet from time to time at the call of the Board. Members of the Council who are not regular full-time employees of the United States shall, while attending meetings of such Council, be entitled to receive compensation at a rate fixed by the Board, but not exceeding $100 per day, including travel time. Such members may be allowed travel expenses, including transportation and subsistence, while away from their homes or regular place of business

**Sec. 1691c. - Administrative enforcement**

**(a)** Enforcing agencies

Compliance with the requirements imposed under this subchapter shall be enforced under:

**(1)** section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of-

**(A)** national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

**(B)** member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act (12 U.S.C. 601 et seq., 611 et seq.), by the Board; and

**(C)** banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

**(2)** Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

**(3)** The Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal Credit Union.

**(4)** Subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board.

**(5)** Part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part.

**(6)** The Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of

Agriculture with respect to any activities subject to that Act.

**(7)** The Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, and production credit association;

**(8)** The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), by the Securities and Exchange Commission with respect to brokers and dealers; and

**(9)** The Small Business Investment Act of 1958 (15 U.S.C. 661 et seq.), by the Small Business Administration, with respect to small business investment companies.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

**(b)** Violations of subchapter deemed violations of preexisting statutory requirements; additional agency powers

For the purpose of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in that subsection may exercise for the purpose of enforcing compliance with any requirement

imposed under this subchapter, any other authority conferred on it by law. The exercise of the authorities of any of the agencies referred to in subsection (a) of this section for the purpose of enforcing compliance with any requirement imposed under this subchapter shall in no way preclude the exercise of such authorities for the purpose of enforcing compliance with any other provision of law not relating to the prohibition of discrimination on the basis of sex or marital status with respect to any aspect of a credit transaction.

**(c)** Overall enforcement authority of Federal Trade Commission

Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce any Federal Reserve Board regulation promulgated under this subchapter in the same manner as if the

violation had been a violation of a Federal Trade Commission trade regulation rule.

**(d)** Rules and regulations by enforcing agencies

The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter

**Sec. 1691c-1. - Incentives for self-testing and self-correction**

**(a)** Privileged information

**(1)** Conditions for privilege

A report or result of a self-test (as that term is defined by regulations of the Board) shall be considered to be privileged under paragraph (2) if a creditor -

**(A)** conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance with this subchapter by the creditor; and

**(B)** has identified any possible violation of this subchapter by the creditor and has taken, or is taking, appropriate corrective action to address any such possible violation.

**(2)** Privileged self-test

If a creditor meets the conditions specified in subparagraphs (A) and (B) of

paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test -

**(A)** shall be privileged; and

**(B)** may not be obtained or used by any applicant, department, or agency in any -

**(i)** proceeding or civil action in which one or more violations of this subchapter are alleged; or

**(ii)** examination or investigation relating to compliance with this subchapter.

**(b)** Results of self-testing

**(1)** In general

No provision of this section may be construed to prevent an applicant, department, or agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if -

**(A)** the creditor or any person with lawful access to the report or results -

**(i)** voluntarily releases or discloses all, or any part of, the report or results to the applicant, department, or agency, or to the general public; or

**(ii)** refers to or describes the report or results as a defense to charges of violations of this subchapter against the creditor to whom the self-test relates; or

**(B)** the report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole purpose of determining an appropriate penalty or remedy.

**(2)** Disclosure for determination of penalty or remedy

Any report or results of a self-test that are disclosed for the purpose specified in paragraph (1)(B) -

**(A)** shall be used only for the particular proceeding in which the adjudication or admission referred to in paragraph (1)(B) is made; and

**(B)** may not be used in any other action or proceeding.

**(c)** Adjudication

An applicant, department, or agency that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in -

**(1)** a court of competent jurisdiction; or

**(2)** an administrative law proceeding with appropriate jurisdiction

**Sec. 1691d. - Applicability of other laws**

**(a)** Requests for signature of husband and wife for creation of valid lien, etc.

A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title,

waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: Provided, however, That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.

**(b)** State property laws affecting creditworthiness

Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this subchapter.

**(c)** State laws prohibiting separate extension of consumer credit to husband and wife

Any provision of State law which prohibits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: Provided, That in any case where such a State law is so preempted, each party to the marriage shall be solely responsible for the debt so contracted.

**(d)** Combining credit accounts of husband and wife with same creditor to determine permissible finance charges or loan ceilings under Federal or State laws

When each party to a marriage separately and voluntarily applies for and obtains separate credit accounts with the same creditor, those accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any State or of the United States.

**(e)** Election of remedies under subchapter or State law; nature of relief determining applicability

Where the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this subchapter or under such State law, but not both. This election of remedies shall not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.

**(f)** Compliance with inconsistent State laws; determination of inconsistency

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

**(g)** Exemption by regulation of credit transactions covered by State law; failure to comply with State law

The Board shall by regulation exempt from the requirements of sections 1691 and 1691a of this title any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this subchapter or that such law

gives greater protection to the applicant, and that there is adequate provision for enforcement. Failure to comply with any requirement of such State law in any transaction so exempted shall constitute a violation of this subchapter for the purposes of section 1691e of this title

**Sec. 1691e. - Civil liability**

**(a)** Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

**(b)** Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and

persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

**(c)** Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

**(d)** Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

**(e)** Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined

by judicial or other authority to be invalid for any reason.

**(f)** Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that -

**(1)** whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,

**(2)** whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

**(g)** Request by responsible enforcement agency to Attorney General for civil action

The agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall

refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

**(h)** Authority for Attorney General to bring civil action; jurisdiction

When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

**(i)** Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of title 42 shall recover under this subchapter and section 3612 of title 42, if such violation is based on the same transaction.

**(j)** Discovery of creditor's granting standards

Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

**(k)** Notice to HUD of violations

Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(a) of this title-

**(1)** has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;

**(2)** has reason to believe that the alleged violation would be a violation of the Fair Housing Act (42 U.S.C. 3601 et seq.); and

**(3)** does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act

**Sec. 1691f. - Annual reports to Congress; contents**

Each year, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this subchapter, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements of this subchapter is being achieved, and a summary of the enforcement actions taken by each of the

agencies assigned administrative enforcement responsibilities under section 1691c of this title